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IN THE SUPREME COURT

OF THE STATE OF UTAH

FILED

SERETA J. WALLIS,

Plaintiff and Appellant

vs. No. 8946

MARVIN E. WALLIS,

Defendant and Respondent

UNIVERSITY UTAH

FEB 16 1959

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BRIEF OF PLAINTIFF
AND APPELLANT

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IN THE SUPREME COURT

OF THE STATE OF UTAH

SERETA J. WALLIS Plaintiff and Appellant vs. MARVIN E. WALLIS Defendant and Respondent	No. 8946

STATEMENT OF FACTS

This Appeal is taken from the Judgment of the Court below, its Findings and Order dated July 18, 1958 (R.p. 52,53). This Order was the result of the Court's decision upon a hearing of an Order to Show Cause by the Plaintiff (R.p. 15) why Judgment of $9417.50 for past due alimony, support arrearages plus interest, costs and attorney's fees should not be entered against Defendant. Said Order to Show Cause was based upon the Affidavit and Motion of the Plaintiff (R.p. 12). The Court at said hearing also considered the

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Defendant's Motion to Modify the existing alimony and support award (R.p. 16).

On or about October 20, 1956, the Plaintiff and Defendant in this case executed an Agreement (R.p. 8) and filed the same with the Court below, together with a petition (R.p. 7) and an Order approving the filing of said Agreement (R.p. 11) on November 20, 1956. The situation at that time as the files and records in this case amply show, was that the Defendant had continually failed to make payments as ordered under the original Decree. The file reflects numerous petitions for Judgment, Uniform Support Act proceedings,etc. The Agreement referred to above is simple in its concept and clear and unambiguous in its terms. It recites the following matters of fact agreed to as correct by both the parties.

1. The original divorce Decree was entered by the Court on the 15th day of February, 1955.

2. By the terms of said Decree, the

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Defendant was ordered to pay the Plaintiff $200.00 a month child support and $150.00 alimony.

3. That the Defendant was at the date of the making of the Agreement, in arrears under the original Decree in the sum of $4117.50, which arrearages had accumulated from October, 1955 through and including September, 1956. It is to be noted here that this sum, Plaintiff concedes, includes an earlier Judgment for $2100.00 (R.p. 1).

The parties then agreed that commencing with October, 1956 the Defendant should pay to the Plaintiff $100.00 a month to be allocated $95.00 support money and $5.00 alimony. The Defendant agreed that the recited arrearages in the sum of $4117.50 would be paid to the Plaintiff within three years from the date of the Agreement. The Plaintiff then agreed that in the event and only in the event that the Defendant henceforth made the $100.00 monthly payment and also paid the arrearages

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within three years, that the Plaintiff would consent to a modification of the Decree to the sum of $125.00 a month at the time that the arrearages were paid in full. She also agreed to waive any and all arrearages which might accrue under the original Decree and during the time of this Agreement from October,1956 forward, but here again only upon the two conditions that the Defendant's payments of $100.00 a month were kept current and that the arrearages were paid up before three years from the date of the Agreement. The Agreement then further expressly provided that in the event that Defendant failed to make the agreed $100.00 monthly payment or pay the accumulated arrearages within the time specified, then in either or both events the Agreement shall be null and void.

Thereafter and commencing with October, 1956, under the Agreement, the Defendant paid the Plaintiff $100.00 a month until February of 1958 when his payments stopped (R.p.24,27)

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and these proceedings were instituted May of 1958. At the hearing on May 29th, the Plaintiff testified (R.p.26.27) that she had calculated all the sums that were due had all payments under the Decree been made and stated that the total amount due as of May 29, 1958 was $9417.50. It is the Plaintiff's position that since the Defendant violated the Agreement of October 20, 1956 that, therefore, the amount due by him to the Plaintiff each month from October 1956 until the date of the hearing was that amount set forth by the original Decree, to-wit: $350.00 per month. The basis for the Plaintiff's claim of $9417.50 as of May, 1958 is, therefore, easily determined. The parties agreed that as of September, 1958, $4117.50 was in arrears. From October 1956 until February 1958, Defendant paid $1700.00 at the rate of $100.00 a month. He then violated the Agreement and, therefore, an additional $250.00 arrearage accumulated each month from and

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including October, 1956 through and including February, 1958, a period of seventeen months, or $4250.00. Then for March, April and May during which months Defendant made no payments, the monthly amount due was $350.00 per month or $1050.00 which added to the $4250.00 is a total of $5300.00. This figure added to the original $4117.50, which the Defendant admitted he owed as of September, 1956, totals $9417.50, which is the amount the Plaintiff testified was due her (R.p.26).

STATEMENT OF POINTS

POINT I.

PLAINTIFF WAS ENTITLED TO A JUDGMENT OF $9417.50 AS OF MAY, 1958 PLUS REASONABLE ATTORNEY'S FEES AND COSTS AND THE COURT'S FAILURE AND REFUSAL TO GRANT THIS JUDGMENT WAS ERROR.

POINT II.

THE COURT ERRED IN FAILING TO RULE THAT THE AGREEMENT OF THE PARTIES FILED PURSUANT TO ORDER OF COURT ON OR ABOUT NOVEMBER 20,1956

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HAD BEEN VIOLATED BY DEFENDANT AND WAS, THEREFORE, NULL AND VOID AND THE PROVISIONS OF THE ORIGINAL DECREE ARE AND ALWAYS HAVE BEEN IN FULL FORCE AND EFFECT.

POINT III.

THE EVIDENCE TAKEN UPON THE HEARING OF PLAINTIFF'S ORDER TO SHOW CAUSE ON MAY 29, 1958 DOES NOT SUPPORT ANY FINDINGS OR RULING ENTITLING THE DEFENDANT TO A MODIFICATION OF THE ORIGINAL DECREE IN THIS MATTER AND NO MATERIAL, SUBSTANTIAL OR PERMANENT CHANGE OF CIRCUMSTANCES WAS SHOWN BY DEFENDANT.

POINT IV.

IT IS PERFECTLY PERMISSIBLE AND PROPER FOR THE PARTIES TO PROPOSE AN AGREEMENT CONDITIONALLY MODIFYING THE TERMS OF THE DIVORCE DECREE AS TO ALIMONY AND SUPPORT PAYMENTS AND TO SUBMIT SAID AGREEMENT TO THE COURT FOR ITS APPROVAL AND ITS PERMISSION TO FILE SAID AGREEMENT AS A RECORD IN THE FILES IN THE CASE. AND THE COURT HAVING APPROVED AND PERMITTED THE FILING OF SUCH AGREEMENT, SHOULD

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ENFORCE IT ACCORDING TO ITS CONDITIONS AND TERMS.

ARGUMENT

POINT I.

PLAINTIFF WAS ENTITLED TO A JUDGMENT OF $9417.50 AS OF MAY, 1958 PLUS REASONABLE ATTORNEY'S FEES AND COSTS AND THE COURT'S FAILURE AND REFUSAL TO GRANT THIS JUDGMENT WAS ERROR.

That the Plaintiff is entitled to a Judgment of $9417.50 as of and including May, 1958 plus reasonable attorney's fees and costs, seems to be clear beyond a doubt if the Agreement of the parties is to be honored and given the construction that its plain and unambiguous terms require. There is certainly nothing wrong with the calculations of the Plaintiff. It was stipulated by both the parties in the Agreement of October 20th and acknowledged in open Court by Defendant's attorney (R.p. 26) that the amount due as of and including September, 1956

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was $4117.50. From that time commencing in October, 1956 through and including February, 1958 the Defendant made seventeen payments of $100.00. If the Defendant by his breach of the Agreement rendered the Agreement null and void, which is Plaintiff's position in this case, then the only thing left to apply would be the original Decree of the Court which required the payment of $350.00 per month. The computation of these figures has already been set forth in the Statement of Facts and needs no repetition here.

Plaintiff's attorney being first sworn (R.p. 44) testified that he had spent at least fifty hours time since the entry of the original Decree bringing every kind of a proceeding possible to compel the Defendant to fulfill his obligations under the Decree. The Court disregarded this testimony and failed to award any amount whatever. The testimony also was that there were $7.20

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costs accrued. It was submitted to the Court that based on this testimony a reasonable attorney's fee in connection with this matter would be the sum of $1,000.00, this is the first time the Plaintiff has had an opportunity in this case to request attorney's fees and the award should cover all the work done for her because of Defendant's failure to pay.

POINT II.

THE COURT ERRED IN FAILING TO RULE THAT THE AGREEMENT OF THE PARTIES FILED PURSUANT TO ORDER OF COURT ON OR ABOUT NOVEMBER 20, 1956 HAD BEEN VIOLATED BY DEFENDANT AND WAS, THEREFORE, NULL AND VOID AND THE PROVISIONS OF THE ORIGINAL DECREE ARE AND ALWAYS HAVE BEEN IN FULL FORCE AND EFFECT.

The Court should have either expressly or in effect, by awarding Plaintiff Judgment in the amount of $9417.50, ruled that the October 20, 1956 Agreement was null and void. It appears from the statement of Defendant's counsel (R.p. 24) as well as the testimony

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of the Plaintiff and indeed from finding number two of the Court's Order appealed from in this matter (R.p. 53) that Defendant did not make any payments after February of 1958 and this failure constituted a breach of the Agreement regardless of whether the failure was intentional, wilfull or otherwise. The condition of continued monthly payments as per the Agreement is absolute. Apparently the Court below must have thought that because Defendant testified that he could not afford to keep up the $100.00 a month payments that this was an excuse of some sort for violating the Agreement.

The conditions insisted on by the Plaintiff as reflected in the October 20th Agreement are there for a purpose. It is obvious from an examination of the files in this case that Defendant has failed to make payments from the very inception of the Decree and that every proceeding available under the law has been necessary to even

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bring him before the Court.

Plaintiff knew of Defendant's unreliability at the time of the Agreement and Defendant certainly had a great deal to gain by living up to the terms of the Agreement. He would have automatically been entitled to a permanent reduction to $125.00 per month and he would have saved $250.00 a month from October, 1956 onward. The only way he could obtain this great advantage to himself at least with the consent of the Plaintiff, was to live up to his Agreement and keep his word with respect to the payment of the $100.00 monthly payments and the final payment of the agreed arrearages. These things the Defendant did not do and if he is to be excused as in effect the Court below has excused him by its Order of July 18th, then an agreement of this type between the parties would be utterly useless and ineffectual and of no use at all. It is Plaintiff's belief, as will be argued under Point IV, that an

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Agreement of this type, in view of the realities of divorced situations, is a wholesome and proper thing and should be encouraged rather than completely ignored as was done by the Court below.

POINT III.

THE EVIDENCE TAKEN UPON THE HEARING OF PLAINTIFF'S ORDER TO SHOW CAUSE ON MAY 29, 1958 DOES NOT SUPPORT ANY FINDINGS OR RULING ENTITLING THE DEFENDANT TO A MODIFICATION OF THE ORIGINAL DECREE IN THIS MATTER AND NO MATERIAL SUBSTANTIAL OR PERMANENT CHANGE OF CIRCUMSTANCES WAS SHOWN BY DEFENDANT.

No citation of authority is necessary to establish the statement that this Court has repeatedly ruled over the years that the alimony and support provisions of a Decree of Divorce will not be modified unless material, substantial and permanent change of circumstances are shown to exist. Defendant testified at length and quite evasively as to his income at the hearing,

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but he specifically testified (R.p. 39,40) that at the time of the entry of this Decree in February of 1955 he was unemployed and further that he was unemployed at the time of the hearing, therefore, apparently his circumstances at least as to employment are precisely the same now as they were at the time of the divorce. The Plaintiff testified (R.p. 40,42) that at the time of the divorce she was earning $300.00 to $333.00 net income and that at the present time her net income is $343.20 a month, an insignificant change in her net income over what she was making at the time of the divorce. Her evidence further shows that she is supporting five children on this money, one of which is the child of Defendant in this case, and her evidence further shows that the amounts which she spends on the parties' child alone consumes a substantial part of her available income.

It is submitted in connection with this

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point that there was complete failure at the hearing of May 29th of any evidence which would entitle the Defendant under the decisions of this state to a modification of the original Decree, and the Court, by its Order of July 18th, has in effect done exactly this by ruling that the Defendant is only required to pay Plaintiff the sum of $100.00 per month.

POINT IV.

IT IS PERFECTLY PERMISSIBLE AND PROPER FOR THE PARTIES TO PROPOSE AN AGREEMENT CONDITIONALLY MODIFYING THE TERMS OF THE DIVORCE DECREE AS TO ALIMONY AND SUPPORT PAYMENTS AND TO SUBMIT SAID AGREEMENT TO THE COURT FOR ITS APPROVAL AND ITS PERMISSION TO FILE SAID AGREEMENT AS A RECORD IN THE FILES IN THE CASE. AND THE COURT HAVING APPROVED AND PERMITTED THE FILING OF SUCH AGREEMENT, SHOULD ENFORCE IT ACCORDING TO ITS CONDITIONS AND TERMS.

Although it does not appear in the

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record, the trial Judge in this matter stated and seemed to feel that because there were conditions in the Agreement herein involved between the parties which conditions could establish the ultimate monetary liability of the Defendant one way or another, according to his conduct in the future, such an Agreement was unenforceable. He further expressed the opinion that the Agreement as filed apparently purported to have the force and effect of a Judgment and then stated that you could have no such thing as a conditional Judgment. It is submitted that the Agreement concerned herein was never intended to and did not come into the case as a Judgment. It did not constitute a modification of any existing Decree at the time that it was filed and even if it had, there is certainly nothing to prevent conditional Judgment of all sorts in divorce matters of this kind, and indeed there are numerous types and classes of conditional Judgments. 30A American Jurisprudence, page 239, Section 120.

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The situation which had arisen between these two parties about the time of the Agreement of October, 1956 is one unfortunately that is not uncommon in divorce situations. Here was a man who had absolutely failed and refused continually, as the record reflects, to live up to his obligations under the Decree. He had moved out of the jurisdiction of the Court, Uniform Support Proceedings had been brought against him, he was difficult to locate, it was a constant struggle for the Plaintiff to realize any sums at all by way of alimony and support payments as ordered under the original Decree. Therefore, it was encumbent upon the Plaintiff or rather on the attorney representing her to devise some way to enforce and insure future payments. The Agreement of October 20, 1956 was simply a means by which it was hoped that support and alimony payments of some kind could be obtained from the Defendant and in order to obtain these payments, the Plaintiff was willing to

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give up very substantial rights that had already accrued to her under the original divorce Decree and which would accrue in the future. All the Defendant had to do within a period of three years was keep up his payments of $100.00 a month and pay off the $4117.50 arrearage which had accumulated by September, 1956. If he had done this he would have saved himself many thousands of dollars or at least a Judgment against him for several thousand dollars. It was the belief of the Plaintiff's attorney at the time of this Agreement and it is most strongly urged upon the Court now that such an arrangement between the parties is not only highly proper, permissible and legal in every respect, but indeed in many situations it is a highly desirable procedure. It amounts to the parties themselves agreeing upon terms and conditions which when ultimately performed will have the effect of modifying the original Decree by consent.

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However, it was the belief of the Plaintiff and her attorney and is still the belief that such proceedings should not be undertaken and such Agreements should not be consummated without the participation and approval of the Court. The parties themselves have no right to tamper with the provisions of a duly entered Decree and Order in a divorce case particularly when they make Agreements which amount to more than mere waivers of sums due as in this case and end up with an Agreement that will actually have the effect of modifying the Court's original Judgment with respect to alimony and particularly support payments. That is the reason that the Agreement of October 20th in this case was laid before the Court for its inspection, approval and filing as a record in the case. This was done by petition (R.p.7) and the status of the Agreement was fixed by the Order of the Court (R.p.11) wherein this Agreement was approved by the Court and its

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filing was permitted in the records of the case. It is submitted that this procedure is a proper, orderly method of bringing to the Court's attention an Agreement of this type. Certainly it would be conceded that the parties have no right to place documents in the Court files at their own pleasure and to make Agreements at their own pleasure which are contrary to lawful and duly entered Orders in a divorce case.

It is a matter of common knowledge that in many original divorce Decrees, the awards are based upon Agreement of the parties subject to the approval of the Court and such procedure is recognized by the authorities everywhere as proper and permissible, and there is excellent authority for the procedure used by the Plaintiff in this case:

> "Notwithstanding the court has power and authority to modify its decree of divorce touching the allowance of a sum of money for the maintenance of the wife, she and her husband may agree in a proper case touching the amount of such sum and the manner of its payment, subject to the approval of the court as

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> to its validity in good morals and as conformable to public policy, and in further consideration of the status and condition of the parties relating to the question of its fairness and equability of adjustment. According to the weight of authority, such a contract, when approved by the solemn decree of the court, becomes forever binding to the same degree and with like effect as ordinary contracts between parties admittedly sui juris, and is not subject to revocation or modification except by the consent of the parties thereto." 17 American Jurisprudence page 775, Section 733.

Here parties reached an Agreement, reduced the Agreement to writing so there would be no mistake or argument in the future about what the terms of that Agreement were. The Agreement was then submitted to the Court for its approval or disapproval and a request was made and granted that the Agreement be filed in the records of the case. Such an Agreement should be honored by the Court and should be enforced if the need arises according to the very terms and conditions of said Agreement which were previously approved by the Court.

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In any event it is submitted that there is nothing present in the present case which would justify the trial Court in ignoring the terms of the Agreement and in refusing to enforce it, which is exactly the result of the Order appealed from here. If such an Agreement is to become meaningless and the Defendant can avoid its terms and conditions on the flimsy excuses offered by the Defendant here, then it is submitted that such Agreements would be of no value or use whatsoever and the parties might as well forget about trying to adjust their own differences if they are not to be held to their Agreements.

It is submitted that under the present ruling and Order of the Court below, the Plaintiff has no idea whatever as to what her rights are under the Decree in this case. She was awarded no Judgment whatever, she was awarded no costs, she was awarded no attorney's fees, nothing was settled or determined as far as she is concerned.

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CONCLUSION

It is respectfully submitted that the
er of July 18, 1958 from which this Appeal
taken be reversed and set aside and that
gment in the amount of $917.50 plus interest
costs together with a Judgment for a reasonable
orney's fee be entered against Defendant,
d Judgment to cover sums due through May of
8, plus an additional award of costs and
orney's fees in connection with this appeal,
that the Agreement of October 20, 1956 be
lared null and void and of no force and effect.

Respectfully submitted,

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